Hue Ngee On v Chai Woo Sien (as public officer of the Hakka Association Kulai, Johor)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J–02–28 OF 2004
LOW HOP BING, HASAN LAH AND ABDUL MALIK ISHAK JJCA
8 JUNE 2009

Civil Procedure — Appeal — Adducing fresh evidence — Application in Court of Appeal for leave to produce further evidence — Whether able to satisfy threshold test — Rules of the Court of Appeal 1994 r 7(1) and (3A)(a) — Conditions in Ladd v Marshall — Whether evidence relevant and material and likely to have determining influence upon decision of Court of Appeal — Whether evidence admissible

Evidence — Fresh or further evidence — Admission of fresh evidence on appeal — Whether able to satisfy threshold test — Rules of the Court of Appeal 1994 r 7(1) and (3A)(a) — Conditions in Ladd v Marshall — Whether evidence relevant and material and likely to have determining influence upon decision of Court of Appeal — Whether evidence admissible

Limitation — Land, recovery of — Commencement of limitation period — Limitation period of 12 years — Claim for recovery of land after 34 years — Whether claim statute barred

In 1967, the respondent ie the Hakka Association Kulai Johor ('the association') purchased a land from the previous registered proprietor, one Hue Tiam, the father of the appellant, at a consideration of RM9,800. The association had settled the balance purchase price and was in possession of the land since 1974. At all material times, the association held the issue document of title and paid the quit rent and assessment for the land. In 2000, the appellant entered a private caveat against the land, but took no further action to enforce his rights, if any. In 2003, the High Court judge made a vesting order in favour of the association and in 2004, transfer of the land to the association was perfected. The appellant appealed. The respondent applied to admit a new affidavit (including the exhibits) as further evidence and to strike out the appellant's appeal. The affidavit contained further evidence to establish that the association was the registered proprietor of the land. No affidavit in reply was filed.

Held, allowing the association's application and striking out the appellant's appeal with costs:

(1) (per **Low Hop Bing JCA**) The principles enunciated in *Ladd v Marshall* [1954] 3 All ER 745 have been accorded statutory recognition in r 7(1) and (3A)(a) of the Rules of the Court of Appeal 1994 ('RCA'). Pursuant to this rule, the Court of Appeal is given full discretionary power to receive further evidence eg by affidavit, if the court is satisfied that: at the hearing before the High Court, the new evidence was not available to the party seeking to use it, or reasonable diligence would not have made it so available; and the new evidence, if true, would have had or would have been likely to have had a determining influence on the High Court decision (see para 7).

(2) (per **Low Hop Bing JCA**) The title to the land was relevant and material evidence. The title would have had or would have been likely to have a determining influence upon the decision of the Court of Appeal. Conditions of r 7(1) and (3A)(a) had been fulfilled and the affidavit was admissible as further evidence. Prior to the further evidence, the association was not the registered proprietor. After the admission of the further evidence, it was abundantly clear that the association as registered proprietor of the land had acquired indefeasibility of title (see paras 8–10).

(3) (per **Low Hop Bing JCA**) The association had taken possession of the land for more than 34 years. The previous registered owner or the appellant took no action whatsoever to recover possession of the land. Hence, s 9(1) of the Limitation Act 1953 applied and rendered the appellant's action in the High Court statute barred (see para 11).

(4) (per **Abdul Malik Ishak JCA**) In the context of adjudicating the respondent's application to admit fresh evidence, all the three conditions in *Ladd v Marshall* had been fulfilled to the core (see para 23).

(5) (per **Abdul Malik Ishak JCA**) At the time of the High Court order, the respondent was not the registered proprietor of the said land. With the admission of the fresh evidence under r 7(1) to be read with r 7(3A)(a) of the RCA the respondent, as the registered proprietor of the said land, stood on firmer ground. The latitude to allow the reception of fresh evidence would depend on the facts of each case (see paras 30 & 37).

[Bahasa Malaysia summary

Pada 1967, responden iaitu Pertubuhan Hakka Kulai Johor ('pertubuhan') membeli sebidang tanah daripada pemilik berdaftar sebelumnya, Hue Tiam, ayah perayu, pada balasan RM9,800. Pertubuhan tersebut telah

menyelesaikan baki harga belian dan memiliki tanah tersebut sejak 1974. Pada masa material, pertubuhan tersebut memegang dokumen hak milik keluaran dan membayar cukai tanah dan taksiran untuk tanah tersebut. Pada 2000, perayu memasukkan kaveat persendirian terhadap tanah tersebut, tetapi tidak mengambil tindakan lanjut untuk menguatkuasakan haknya, sekiranya ada. Pada 2003, hakim Mahkamah Tinggi membuat perintah letak hak kepada pertubuhan dan pada 2004, pemindahan tanah kepada pertubuhan disempurnakan. Perayu merayu. Responden memohon untuk menerima afidavit baru (termasuk ekshibit-ekshibit) sebagai keterangan lanjut dan untuk membatalkan rayuan perayu. Afidavit yang mengandungi keterangan lanjut adalah untuk membuktikan bahawa pertubuhan tersebut merupakan pemilik berdaftar tanah berkenaan. Tiada afidavit balasan difailkan.

Diputuskan, membenarkan permohonan pertubuhan dan membatalkan rayuan perayu dengan kos:

(1) (oleh **Low Hop Bing HMR**) Prinsip-prinsip yang dinyatakan dalam *Ladd v Marshall* [1954] 3 All ER 745 telah diberikan pengiktirafan statutori dalam k 7(1) dan (3A)(a) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR'). Menurut kaedah ini, Mahkamah Rayuan diberikan kuasa budi bicara untuk menerima keterangan lanjut contohnya melalui afidavit, sekiranya mahkamah berpuas hati bahawa: pada perbicaraan di Mahkamah Tinggi, keterangan baru tidak boleh didapati pada pihak yang menuntut untuk menggunakannya, atau usaha yang munasabah tidak membuatkannya boleh didapati; dan keterangan baru, sekiranya benar, akan atau berkemungkinan mempunyai pengaruh menentukan keputusan Mahkamah Tinggi (lihat perenggan 7).

(2) (oleh **Low Hop Bing HMR**) Hak milik tanah merupakan keterangan yang relevan dan material. Hak milik tanah ada atau berkemungkinan mempunyai pengaruh menentukan keputusan Mahkamah Rayuan. Syarat-syarat k 7(1) dan (3A)(a) telah dipenuhi dan afidavit diterima sebagai keterangan lanjut. Sebelum keterangan lanjut, pertubuhan tersebut bukan merupakan pemilik berdaftar. Selepas penerimaan keterangan lanjut, adalah jelas bahawa pertubuhan tersebut sebagai pemilik berdaftar tanah tersebut mempunyai hak milik tak boleh sangkal (lihat perenggan 8–10).

(3) (oleh **Low Hop Bing HMR**) Pertubuhan tersebut telah memiliki tanah tersebut lebih daripada 34 tahun. Pemilik berdaftar sebelumnya atau perayu tidak mengambil apa-apa tindakan untuk mendapatkan semula milikan tanah tersebut. Oleh itu, s 9(1) Akta Had Masa 1953

digunakan dan membuatkan tindakan perayu di Mahkamah Tinggi dihalang oleh statut (lihat perenggan 11).

(4) (oleh **Abdul Malik Ishak HMR**) Dalam konteks membuat keputusan membenarkan permohonan responden untuk menerima keterangan baru, ketiga-tiga syarat utama dalam *Ladd v Marshall* telah dipenuhi (lihat perenggan 23).

(5) (oleh **Abdul Malik Ishak HMR**) Pada masa perintah Mahkamah Tinggi, responden bukan pemilik berdaftar tanah tersebut. Dengan penerimaan keterangan baru di bawah k 7(1) dibaca bersama k 7(3A)(a) KMR responden, sebagai pemilik berdaftar tanah tersebut, berdiri atas dasar yang kukuh. Latitud untuk membenarkan penerimaan keterangan baru bergantung kepada fakta-fakta setiap kes (lihat perenggan 30 & 37).]

Notes

For a case on admission of fresh evidence on appeal, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1534.

For cases on adducing fresh evidence, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 637–662.

For cases on commencement of limitation period, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2338–2339.

Cases referred to

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 CLJ 526, CA (refd)

Breskvar & Anor v Wall & Ors (1971) 126 CLR 376, HC (refd)

Chasfild Pty Ltd v Taranto & Anor [1991] 1 VR 225, SC (refd)

Ellis v Leeder (1950–1951) 82 CLR 645, CA (refd)

Frazer v Walker & Ors [1967] 1 All ER 649, PC (refd)

Gibbs v Messer & Ors [1891] AC 248, PC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)

Ladd v Marshall [1954] 3 All ER 745; [1954] 1 WLR 1489, CA (folld)

Ng Kheng Yeow v Chiah Ah Foo & Ors [1987] 2 MLJ 330, SC (refd)

Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd [1998] 2 MLJ 463, CA (refd)

Sinanide v La Maison Cosmeo (1927–1928) 44 TLR 574 (refd)

Teh Bee v K Maruthamuthu [1977] 2 MLJ 7, FC (refd)

Teoh Kien Peng v Thannimalai a/l Subramaniam [2008] MLJU 403, CA (refd)

Legislation referred to

FMS Land Code 1928 s 42

Limitation Act 1953 s 9(1)

National Land Code ss 328, 340

Real Property Act 1886 [AUS] s 69
Rules of the Court of Appeal 1994 r 7(1), (3A)(a)

Appeal from: Originating Summons No 24–16332003(2) (High Court, Johor Bahru)

HK Tan (HK Tan & Co) for the appellant.
Wong Kim Fatt (Wong Boon Lee with him) (Gulam & Wong) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

NOTICE OF MOTION

[1] This is the respondent's application by way of notice of motion in encl (27a) which seeks to admit encl (27b) ie the supporting affidavit (including the exhibits) of one Lee Soon Loy, affirmed on 16 January 2009, as further evidence; and to strike out the appellant's appeal. No affidavit in reply was filed.

FACTUAL BACKGROUND

[2] In 1967, the respondent ie the Hakka Association Kulai Johor ('the association') purchased the land held under PTB 822, HS(D) 23377 in the township of Kulai ('the land') measuring 156.0771 sq metres or 1,680 sq ft from the previous registered proprietor, one Hue Tiam, the father of the appellant, at a consideration of RM9,800. The association paid the balance of the purchase price to the previous registered proprietor in 1974. The association, as beneficial owner thereof, has been in possession of the land since 1974. The association built the shophouse on the land at a cost of RM136,752.50. At all material times, the association has been holding the issue document of title, paying all the quit rents and assessments for the land.

[3] On 9 August 2000, the appellant entered a private caveat against the land, but took no further action to enforce his rights, if any.

[4] On 2 December 2003, the Johor Bahru High Court judge made a vesting order ('the High Court order') in favour of the association. On 8 January 2004, transfer of the land to the association was perfected.

ADMISSIBILITY OF FURTHER EVIDENCE

[5] Appellant's learned counsel Ms HK Tan objected to the association's

application to admit the affidavit (including the exhibits) as further evidence. She argued that the appeal should be heard, instead of being struck out at this stage.

[6] In response, the association's learned counsel Dr Wong Kim Fatt (assisted by Mr Wong Boon Lee) submitted that the affidavit (including the exhibits) should be admitted as further evidence in order to establish that the association is the registered proprietor of the land, as a result of which the appellant's appeal should be struck out.

[7] We shall first consider the association's prayer for the admissibility of further evidence. The governing principles enunciated in *Ladd v Marshall* [1954] 3 All ER 745 have been accorded statutory recognition in r 7(1) and (3A)(a) of the Rules of the Court of Appeal 1994. Pursuant to this rule, this court is given full discretionary power to, inter alia, receive further evidence eg by affidavit, so long as the court is satisfied that:

(a) at the hearing before the High Court, the new evidence was not available to the association ie the party seeking to use it, or reasonable diligence would not have made it so available; and

(b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court.

[8] Vide the affidavit, the said Lee Soon Loy affirms, inter alia, that the land was on 8 January 2004 duly vested and registered in the name of the association free from all encumbrances. The association appears as the registered proprietor of the land in the issue document of title ('the title'). The title to the land is relevant and material evidence, showing that the registration of the transfer was not available at the hearing before the High Court on 2 December 2003 and that the registration or vesting of the title occurred after the High Court order. The title would have had or would have been likely to have a determining influence upon the decision of the Court of Appeal. We are of the view that the conditions of r 7(1) and (3A)(a) have been fulfilled and we admitted the affidavit (including the exhibits) as further evidence.

[9] Prior to the further evidence, the association was not the registered proprietor. However, it was the beneficial owner of the land, and had the better equity than the appellant: see *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330 at p 332 G–G, left, per Lee Hun Hoe CJ (Borneo) (as he then was).

[10] After the admission of the further evidence under r 7(1) and (3A)(a), it is abundantly clear to us that the association as registered proprietor of the

land has acquired indefeasibility of title with effect from 8 January 2004: *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 (FC), which was referred to in *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526 at p 538C (CA). Registration of the association as proprietor of the land is conclusive evidence that the title is vested in the association. This is in line with the doctrine of indefeasibility of title under s 340 of the National Land Code 1965.

[11] Further, since 1974, the association, on completion of the sale and purchase, had taken possession of the land for more than 34 years. The previous registered owner Hue Tiam or his son, the appellant, took no action whatsoever to recover possession of the land. Hence, s 9(1) of the Limitation Act 1953 which prescribes a limitation period of 12 years, commencing from the date on which the right of action accrued, to recover land, applies to the instant appeal so as to render the appellant's action in the High Court statute barred.

[12] Next, after the private caveat was entered by the appellant against the land on 9 August 2000 ie some nine years ago, the appellant had not taken any timeous action in court to enforce his rights, if any. Section 328 of the National Land Code provides for the lapse of a private caveat at the expiry of six years from the time the caveat took effect. The private caveat had clearly lapsed: *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463 (CA) at pp 468I and 469A-B. With the lapse of the private caveat, the appellant no longer has any interest or capacity vis-à-vis the land.

CONCLUSION

[13] By reason of the foregoing grounds, we allowed the association's application in encl (27a). Consequentially, the appellant's appeal was struck out with costs.

Abdul Malik Ishak JCA:

[14] By way of encl 27a, the respondent (The Hakka Association Kulai, Johor) sought two orders, namely:

(a) to admit, under r 7(1) and r 7(3A)(a) of the Rules of the Court of Appeal 1994, the whole of the supporting affidavit of Mr Lee Soon Loy (encl 27b) affirmed on 16 January 2009 as the registration or vesting of the title to the land in question on 8 January 2004 occurred after the High Court order of 2 December 2003; and

(b) to strike out or dismiss the appeal of the appellant.

[15] Prayer (a) of encl 27a prayed for the reception of fresh evidence while prayer (b) to the same enclosure prayed to either strike out or dismiss the appeal.

ANALYSIS

[16] The conditions stated in *Ladd v Marshall* [1954] 1 WLR 1489 (CA), have been followed by the English Court of Appeal for more than half a century and are in no way in conflict with the overriding objective of dispensing justice to litigants. It must be borne in mind that it will not be in the interests of justice to re-open a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result of the case (this is the second of the conditions stated in *Ladd v Marshall*).

[17] One must not distract from the fact that the question of whether fresh evidence should be received is entirely a matter of discretion to be exercised in a principled way. Whether fresh evidence is admissible upon an application under r 7(3A)(a) of the Rules of the Court of Appeal 1994, that is to say, that fresh evidence was not available to the respondent who wanted to use it before the High Court on 2 December 2003 or that the fresh evidence which could not with reasonable diligence have been obtained in time for the hearing before the High Court on 2 December 2003 is entirely one of subjective satisfaction for this court to satisfy. And may I add that whether the fresh evidence might and should have been obtained with reasonable diligence at the High Court hearing on 2 December 2003 — that will be a factor for this court to take into account in its deliberation.

[18] To object to the receiving of fresh evidence where that would trigger a re-trial as in *Ladd v Marshall*, is entirely different from a situation where one objects to the receiving of fresh evidence on an appeal by way of a re-hearing. The distinction can be seen in *Ellis v Leeder* (1950–1951) 82 CLR 645, in the judgment of Dixon, Williams and Kitto JJ (at p 655) where it was said that the Court of Appeal invited to receive further evidence to enable it better to determine an appeal which is before it is exercising a different function to a court concerned with the justice of setting aside a decision obtained after a full trial and sending the case back for a new trial. In the former situation, the purpose of the further evidence is to enable the Court of Appeal to appraise the facts and be in a better position to reach a final determination of the proceeding. Now, by virtue of r 7(1) read with r 7(3A)(a) of the Rules of the Court of Appeal 1994, the power to receive evidence on an appeal by way of re-hearing is statutory and discretionary. And whether the discretion is exercised one way or the other depends ultimately on the facts of each case. However, there may be cases where it will be thought proper to admit fresh

evidence on an appeal by way of a re-hearing simply on the ground that it appears just to do so as was done in *Sinanide v La Maison Cosmeo* (1927–1928) 44 TLR 574.

[19] The germane facts are set out in the affidavit in support of Lee Soon Loy that was affirmed on 16 January 2009 and my learned brother Low Hop Bing JCA has correctly set them out in clear terms in his judgment. The land in question is the centre of dispute between the parties.

[20] The respondent sought to admit the whole of the supporting affidavit of Lee Soon Loy in order to categorically establish that the respondent is the registered proprietor of the land in question which would vest the respondent with indefeasibility of title with effect from 8 January 2004. This piece of evidence was not available before the learned High Court judge when he made the order on 2 December 2003. This was the basis and the plank of the arguments advanced by the respondent's learned counsel in the person of Dr Wong Kim Fatt who was assisted by Mr Wong Boon Lee in seeking to admit the supporting affidavit of Lee Soon Loy. And flowing from that, Dr Wong Kim Fatt submitted that the appellant's appeal should be struck out forthwith.

[21] Miss HK Tan, learned counsel for the appellant, objected to the respondent's application to admit the whole of the supporting affidavit of Lee Soon Loy as fresh evidence. She implored this court to hear the appeal instead of striking out the appeal at this point of time.

[22] Denning LJ, in delivering a separate judgment in *Ladd v Marshall*, laid down the law in this way (see p 1491):

> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

[23] The three conditions in *Ladd v Marshall* must be fulfilled before this court would be prepared to receive the whole of the supporting affidavit of Lee Soon Loy as fresh evidence. In the context of adjudicating the respondent's application to admit fresh evidence in encl 27a, all the three conditions in *Ladd v Marshall* have been fulfilled to the core.

[24] The three conditions laid down in *Ladd v Marshall* may be paraphrased in this way. That the fresh evidence, firstly, could not have been obtained with reasonable diligence for use at the trial; secondly, would probably have an important influence on the result of the case, although it need not be decisive; and, thirdly, must be apparently credible, though it need not be incontrovertible.

[25] Then there is r 7(1) of the Rules of the Court of Appeal 1994 which states as follows:

> 7 Power of Court to amend, admit further evidence, or draw inferences of fact
>
> (1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by the deposition taken before an examiner or Commissioner.

[26] While r 7(3A)(a) of the Rules of the Court of Appeal 1994 reads as follows:

> Power of Court to amend, admit further evidence, or draw inferences of fact
>
> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that —
>
> (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; …

[27] It cannot be denied that *Ladd v Marshall* together with the statutory rules in the Rules of the Court of Appeal 1994 as alluded to above have provided a systematic and principled judicial guidance for this court to follow and adhere to.

[28] Yet, there were cases where the courts had admitted fresh evidence without reference to the principles in *Ladd v Marshall*. This would relate to cases that turned on the legality of a ministerial decision. In an unreported dissenting judgment in the Court of Appeal vide Civil Appeal No P–04–50 of 2006, *Teoh Kien Peng & Anor v Thannimalai a/l Subramaniam* [2008]

MLJU 403, I had occasion to say something about such cases and this was what I said at pp 25–26, at paras [44]–[45]:

[44] There were cases in the past where the courts had admitted fresh evidence without even referring to the principles in *Ladd v Marshall*. This involved cases which turned on the legality of a ministerial decision where the evidence was not available when the Minister made the initial determination and where the Minister was regarded, all along, as having responsibility over the matter. In this connection, two cases immediately come to the forefront. The first would be the case of *Regina v Secretary of State for the Home Department, Ex parte Launder* [1997] 1 WLR 839 at pp 860–861. The second would be the case of *Regina v Secretary of State for the Home Department, Ex parte Simms & Anor* [2000] 2 AC 115 at p 127.

[45] Notwithstanding the fact that the error could have been spotted by the applicant's advisers at the time of the decision by the Immigration Appeal Tribunal ('IAT'), the Court of Appeal in *Tewedros Tadesse Haile v Immigration Appeal Tribunal* [2001] EWCA Civ 663; [2002] INLR 283 allowed the error to be rectified by adducing fresh evidence in order to show the identity of the Ethiopian political party with which the applicant was connected. Simon Brown LJ acknowledged that the evidence would not have passed the first condition under the *Ladd v Marshall* test because the mistake should have been noticed by the applicant's advisers before the IAT gave its decision but His Lordship was prepared to hold that the principles underlying that decision which was that there must be finality in litigation were applicable subject to the overriding judicial discretion to depart from them *provided the wider interests of justice so required*.

[29] What appears to be just and the justice of the case are reasons that would allow for admission of fresh evidence by way of a re-hearing. I would certainly not stand in the way of doing justice to an applicant who wants to admit fresh evidence like the present application of the respondent in encl 27a. Permit me, once again, to refer to my unreported dissenting judgment in the Court of Appeal vide Civil Appeal No P–04–50 of 2006, *Teoh Kien Peng & Anor v Thannimalai a/l Subramaniam*. There at pp 23–24, at paras [40]–[43], I had this to say:

[40] Should we slavishly follow *Ladd v Marshall* or should we be freed from its strait-jacket three conditions? Sad to say, it is the courts that let the three conditions in *Ladd v Marshall* to be compartmentalised as a strait-jacket. For my part, I will not let *Ladd v Marshall* to stand in the

way of doing justice to an individual case. Old vintage cases like *Scott v Scott* [1863] 3 Sw & Tr 320 at p 325; 164 ER 1298 at p 1300; and *Brown v Dean & Anor* [1910] AC 373 should be referred to and these two cases have been overshadowed and ignored and put into oblivion since the arrival of *Ladd v Marshall* in 1954. The court said in *Scott v Scott* that:

> It has never been the habit in Westminster Hall to grant new trials on the simple ground that the party could make the same case stronger by corroborating testimony (even though newly discovered) if another trial were allowed. And if it were otherwise, there are few cases that would not be tried a second time.

[41] Lord Loreburn LC in *Brown v Dean* said that when a litigant has obtained a judgment in a court of justice he is by law entitled not to be deprived of that judgment without very solid grounds and where the ground concerns the alleged discovery of new evidence, 'it must at least be such as is presumably to be believed, and if believed, would be conclusive'.

[42] Cases may arise in future where it would be proper to admit fresh evidence on an appeal by way of a re-hearing on the simple ground that it appears just to do so and nothing else (*Sinanide v La Maison Cosmeo* (1927–1928) 44 TLR 574). An objection may be raised to the receipt of fresh evidence where that would trigger a re-trial like the case of *Ladd v Marshall* as opposed to an objection of receiving fresh evidence on an appeal by way of a re-hearing. The distinction between these two was set out in the case of *Ellis v Leeder* (1950–1951) 82 CLR 645 and there at p 655 it was held that a Court of Appeal invited to receive further evidence was to enable it to be placed in a better position to determine an appeal which was before it whereas a court concerned with the setting aside of the decision obtained after a regular trial would send the case down for a new trial.

[43] According to the case of *Sara Lee Household & Body Care UK Ltd v Johnson Wax Ltd* [2001] FSR 17, it would require an exceptional case before the court was prepared to accede to an application to adduce new evidence where the applicant could not satisfy the three conditions in *Ladd v Marshall*.

[30] Here, factually speaking, at the time of the High Court order of 2 December 2003, the respondent was not the registered proprietor of the said land. With the admission of the fresh evidence under r 7(1) to be read with r 7(3A)(a) of the Rules of the Court of Appeal 1994 the respondent, as

the registered proprietor of the said land, stands on firmer ground. According to Peter Butt, *The Conveyancer — Indefeasibility and sleights of hand* (1992) 66 ALJ 596 at p 597 that:

> Public confidence in the Torrens system depends upon the rock-solid effect of registration.

[31] And according to the case of *Gibbs v Messer & Ors* [1891] AC 248 at p 254, the public faith in the Torrens system is reinforced by the indefeasibility concept which serves as a shield to protect against attacks on title. And that indefeasibility is the fundamental feature of all Torrens systems which save the persons dealing with the registered proprietors from the trouble and expense of going behind the register.

[32] In Australia, the pronouncement by Barwick CJ in *Breskvar & Anor v Wall & Ors* (1971) 126 CLR 376 at p 385 that, *The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration* settled, once and for all, the lingering doubts of the decision of *Frazer v Walker & Ors* [1967] 1 All ER 649. Since *Breskvar & Anor v Wall & Ors*, the immediate indefeasibility view taken by the High Court has prevailed as the law in Australia despite the diversity in expression by other judges there particularly in *Chasfild Pty Ltd v Taranto & Anor* [1991] 1 VR 225.

[33] Back home, we have s 340 of the National Land Code ('NLC'). This provision was drafted based on s 42 of the FMS Land Code 1928 and it corresponds quite closely to s 69 of the South Australia Real Property Act 1886 and this provision is paramount and it confers indefeasibility in the Malaysian Torrens system (*Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 at p 10 (FC)); and *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 at p 460 (PC).

[34] Commencing from 1974, the respondent took possession of the said land for more than 34 years upon completion of the sale and purchase transaction. The appellant's father, Mr Hue Tiam, did not take any action whatsoever to repossess the said land and by virtue of s 9(1) of the Limitation Act 1953 which sets out the limitation period of 12 years, the appellant's action in the High Court was statute barred. There was nothing for the appellant to hold onto. Even the private caveat which the appellant entered against the said land on 9 August 2000 — some nine years ago, had lapsed by virtue of s 328 of the NLC.

[35] All the facts favoured the respondent. With the admission of the fresh evidence in the form of the whole of the supporting affidavit of Lee Soon Loy,

the respondent's position was further strengthened. Even with the exercise of reasonable diligence, the fresh evidence would not have been available for use in the High Court on 2 December 2003. The fresh evidence to show that the respondent is the registered proprietor of the said land was only made available on 8 January 2004.

[36] The admission of fresh evidence would vary from case to case and from one situation to another. The complexion to a particular case would only change and would become apparent in the light of the fresh evidence like the present application in question. Allow me to demonstrate further by referring, once again, to my unreported dissenting judgment in the Court of Appeal vide Civil Appeal No P–04–50 of 2006, *Teoh Kien Peng & Anor v Thannimalai a/l Subramaniam*. There at pp 43–46 and at paras [75]–[79], I had this to say:

> [75] I will now refer to the case of *Prentice v Hereward Housing Association and East Cambridgeshire District Council* [2001] EWCA Civ 437; [2001] 2 All ER (Comm) 900, not cited by either party. The facts may be stated as follows. On 6 July 1994, the claimant fell on a grassed area outside his home and suffered serious injuries to his left ankle. Proceedings for damages were commenced against the first and second defendants, with the claimant alleging that the defendants had been in breach of their duties under the Occupiers' Liability Act 1957 and had also been negligent. The claimant and his wife both gave evidence to the effect that the claimant had gone outside his house wearing slippers, in order to shut the sun roof on his car, and had tripped in a large pot-hole. This evidence was not contradicted and the trial judge accepted the honesty of the witnesses and their account of the facts. The trial judge held that the second, but not the first, defendants were liable for the injuries. The trial judge also held that the claimant was 30% to blame for his own injuries and that being the case the claimant was entitled to 70% of the agreed damages of £340,000 and that would be for the sum of £238,000. The claim was handled by the second defendants' liability insurers.
>
> [76] The trial was reported in the local newspaper. As a result of the judgment, a number of local residents contacted the first defendant and told them that the accident had not occurred as reported in the local newspaper. This prompted the second defendants' insurers to conduct inquiries and they succeeded in obtaining witness statements from seven local residents. The new witnesses stated that they had either seen the accident or were present in its aftermath or had been told by the claimant himself as to what had happened. Their versions were that the claimant had been bare-footed and that the accident occurred some three metres away from any pot-hole while the claimant was playfully

chasing his stepson. The residents also stated in their witness statements that they were not aware that any claim had been made until they read the outcome of the trial in the local newspaper. The residents said that they were motivated in coming forward because they were shocked on learning that a false claim had been made against the defendants. Of course, all these were denied by the claimant and his wife.

[77] The second defendant then appealed to the English Court of Appeal seeking an order for a retrial so that the evidence of the additional witnesses could be considered by the trial judge. Under r 52.10(2) of the CPR, the English Court of Appeal has the power to order a re-trial. That provision re-enacts in the same terms as O 59 r 10(2) of the Rules of the Supreme Court: in the *Prentice* case the latter provision was operative because the former had not come into force at the relevant time. The English Court of Appeal ruled that the principles applicable under both regimes were the same. Those principles had been set out in *Ladd v Marshall*.

[78] The English Court of Appeal was satisfied that each of the requirements in *Ladd v Marshall* had been met and that a retrial should be ordered. It was held that the new evidence was sufficiently cogent to affect the outcome of the trial and that it was on its face to be believed. It was also held that the key issue was whether the new evidence could, with reasonable diligence have been discovered by the second defendant and their insurers prior to the original trial. The claimant asserted that the insurers should have carried out investigations as to the existence of the pot-hole and as to the circumstances of the accident; and according to the claimant this could have been done either by writing to those in the neighbourhood or by sending an investigating officer to the houses of the neighbours in order to ascertain what had happened.

[79] The main judgment of the English Court of Appeal in *Prentice* was delivered by Kay LJ. The learned judge held that this type of obligation was unrealistic. Liability insurers faced with such a claim were entitled to start on the assumption that the claim presented against the assured was a genuine one rather than based on the assumption that the claim was false and had to be investigated. In the absence of anything suspicious in the claim itself or arising from the insurers investigations, the claim was to be treated as honest. Flowing from all these, the learned judge held that the insurers had acted perfectly proper and were thus entitled to have the matter re-opened since the fresh evidence had come to light.

A **[37]** The latitude to allow the reception of fresh evidence would depend on the facts of each case. In the circumstances, I would make those orders that were made by my learned brother Low Hop Bing JCA.

Association's application allowed. Appellant's appeal struck out with costs.

B

Reported by Kanesh Sundrum

C

D

E

F

G

H

I